

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DENISE R. KETCHMARK,

Plaintiff-Appellant,

v

ARCHIE L. HAYMAN,

Defendant-Appellee.

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UNPUBLISHED

June 17, 2014

No. 313839

Genesee Circuit Court

LC No. 12-099160-NO

Before: SAWYER, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals by right the order granting summary disposition in favor of defendant. We affirm.

This case arises from the dissolution of a longstanding romantic relationship. Between 1993 and 2012, the parties were romantically involved, and the relationship purportedly produced two children.<sup>1</sup> Although defendant allegedly made representations regarding his commitment to plaintiff, his actions contradicted his representations. In 2001, defendant married another woman. When confronted about the marriage by plaintiff, defendant submitted that it was a sexless marriage of convenience entered into following a depressive state over the death of his daughter. However, this marriage did not serve as the only evidence of the lack of exclusiveness in the relationship. Plaintiff knew of rumors in the community that defendant was a “womanizer,” and found a woman waiting for defendant in his apartment complex parking lot who later represented that she was defendant’s girlfriend. Although defendant contended that he resided with his mother, sister, and a great-nephew that defendant cared for, defendant never allowed plaintiff to visit his residence. Plaintiff suspected that the great-nephew was actually defendant’s child particularly when his statement of denial later became, “It’s complicated.” Further, plaintiff, a licensed attorney, investigated and learned that a female individual helping to raise defendant’s great-nephew resided in defendant’s apartment. The parties’ relationship ended when plaintiff learned in August 2012 of defendant’s impending wedding to yet another woman. Before the wedding occurred, plaintiff advised defendant that she was pregnant. This representation did not prevent the wedding from occurring. However, plaintiff’s gynecologist

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<sup>1</sup> A companion action addressing paternity was pending at the time of this civil suit.

concluded that plaintiff was not pregnant, but suffered from the human papillomavirus (HPV) infection, a sexually transmitted disease (STD). These factual allegations form the basis of plaintiff's claims of intentional infliction of emotional distress, negligence, and fraud.

Defendant moved for summary disposition of the complaint pursuant to MCR 2.116(C)(8), contending that plaintiff failed to state a claim. Plaintiff opposed the motion. The trial court granted defendant's motion in an extensive opinion and order. From this ruling, plaintiff appeals.

The trial court's decision regarding a motion for summary disposition is reviewed de novo. *Badeen v PAR, Inc*, 300 Mich App 430, 439; 834 NW2d 85 (2013). A motion premised on MCR 2.116(C)(8) tests whether a claimant stated a legally cognizable claim. *Id.* When analyzing this motion, this Court accepts all well-pleaded facts as true and construes them in the light most favorable to the nonmoving party. *Id.* When the court considers evidence outside the pleadings, this Court reviews the decision as having been made pursuant to MCR 2.116(C)(10). *Citizens Bank v Boggs*, 299 Mich App 517, 519 n 1; 831 NW2d 876 (2013). The factual support for a claim is tested in a motion for summary disposition pursuant to MCR 2.116(C)(10). *Nuculovic v Hill*, 287 Mich App 58, 61-62; 783 NW2d 124 (2010). In this instance, the nonmoving party may not rest on mere allegations or denials in the pleadings, but must set forth specific facts demonstrating a genuine issue of material fact for trial. *Id.* When an appellant fails to challenge the basis of the ruling by the trial court, we need not even consider granting the party the relief requested. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004).

“For a plaintiff to be sufficiently apprised of a cause of action, a plaintiff need only be aware of a ‘possible cause of action.’” *Doe v Roman Catholic Archbishop*, 264 Mich App 632, 643; 692 NW2d 398 (2004) (citation omitted).

To establish a claim of intentional infliction of emotional distress, a plaintiff must prove the following elements: ‘(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress.’ The conduct complained of must be ‘so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.’ It is for the trial court to initially determine whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. But where reasonable individuals may differ, it is for the jury to determine if the conduct was so extreme and outrageous as to permit recovery. [*Hayley v Allstate Ins Co*, 262 Mich App 571, 577; 686 NW2d 273 (2004) (citations omitted.)]

To establish a cause of action for negligence, four elements must be proven: (1) that defendant owed a legal duty to the plaintiff; (2) the defendant breached the duty; (3) damages were incurred; and (4) the defendant's breach was a proximate cause of the plaintiff's damages. *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007). Fraud is actionable when it appears “(1) [t]hat defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff;

(5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury.” *Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012) (citation omitted). A party cannot establish reliance when one has full knowledge to the contrary of a representation. *Id.* at 555 n 4. This does not require a full-blown investigation by the plaintiff. It is a well-known proposition that “there can be no fraud where the means of knowledge regarding the truthfulness of the representation are available to the plaintiff and the degree of their utilization has not been prohibited by the defendant.” *Webb v First of Mich Corp*, 195 Mich App 470, 474; 491 NW2d 851 (1992). However, a party cannot be defrauded when given direct information that refutes the misrepresentations. *Titan Ins Co*, 491 Mich at 555-556 n 4. “Ignoring information that contradicts a misrepresentation is considerably different than failing to affirmatively and actively investigate a representation.” *Id.*

In the present case, the trial court held that, even assuming the factual allegations contained in the complaint were true, plaintiff failed to demonstrate atrocious and utterly intolerable conduct, and failed to demonstrate a duty for purposes of negligence and fraud in light of the nature of the HPV infection. We agree. Here, defendant made representations regarding his commitment to plaintiff and his desire to marry her, but he failed to fulfill those promises. Similarly, plaintiff suspected that defendant did not treat the relationship as exclusive and learned in 2001, that he had married another woman. Rather than recognize the lack of veracity, as the trial court noted, plaintiff continued the relationship and allowed the conduct to continue. The trial court correctly concluded, as a matter of law, that the conduct alleged was insufficient to submit to a jury for purposes of intentional infliction of emotional distress. *Hayley*, 262 Mich App at 577. With regard to the claims of negligence and fraud, the trial court analyzed external documentation regarding the HPV infection to conclude that the disease was common, may be present even if years had passed since the exposure to an infected person, did not necessarily result in symptoms, and could be cleared naturally by the body’s immune system. In light of the nature of the infection, the trial court held that plaintiff could not establish a duty for purposes of negligence and fraud. On appeal, plaintiff failed to challenge the trial court’s summation of the nature of HPV as applied to the elements of the claims, and therefore, cannot establish entitlement to appellate relief. *Derderian*, 263 Mich App at 388.<sup>2</sup> Moreover, plaintiff cannot satisfy the fraud claim in light of her ignorance of the information that contradicted defendant’s alleged statements. *Titan Ins Co*, 491 Mich at 555-556 n 4.

Next, plaintiff alleges that the trial court should have granted her the opportunity to amend her complaint. We disagree. We review for an abuse of discretion the trial court’s

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<sup>2</sup> We note that, as an *alternative* argument to dismiss, the trial court held that plaintiff’s claims were barred because of her participation in adultery and her culpability in the affair. Plaintiff contends that there is an exception to the wrongful conduct rule. We need not address this alternative argument cited by the trial court because we conclude that summary disposition was proper as delineated above. Further, in light of our ability to resolve this appeal premised on the factual allegations that attribute knowledge of lack of exclusiveness to plaintiff and the nature of the STD at issue, we decline to address the broad question of the type of disease and the facts underlying transmission that would be actionable.

decision to grant or deny a plaintiff's motion for leave to amend the complaint. *Sanders v Perfecting Church*, 303 Mich App 1, 9; 840 NW2d 401 (2013). A motion to amend will ordinarily be granted unless the amendment would be futile. *Id.* An abuse of discretion occurs when the decision is outside the range of reasonable and principled outcomes. *Boylan v Fifty-Eight, LLC*, 289 Mich App 709, 727; 808 NW2d 277 (2010). Plaintiff contends that she should have been permitted to conduct discovery because it is possible that defendant contracted the disease and suffered from symptoms. However, plaintiff's contention is contrary to the information set forth about the disease in the trial court's decision, and plaintiff failed to counter the court's conclusions.<sup>3</sup> Accordingly, the trial court did not abuse its discretion by implicitly denying the request to amend raised in response to the dispositive motion.

Affirmed. Defendant, the prevailing party, may tax costs. MCR 7.219.

/s/ David H. Sawyer  
/s/ Patrick M. Meter  
/s/ Karen M. Fort Hood

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<sup>3</sup> In accordance with the trial court's ruling, there is no test for HPV, most people with HPV do not know they are infected, and most never develop symptoms or health problems from the disease. See < <http://www.cdc.gov/std/hpv/stdfact-hpv.htm>> (accessed June 6, 2014).